THE SEPTEMBER 11TH VICTIM COMPENSATION FUND: RETHINKING THE DAMAGES ELEMENT IN INJURY LAW

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Perhaps not surprisingly, the September 11th Victim Compensation Fund of 2001 (the "Fund"), even in its short life span,[1] has generated praise, condemnation, controversy, and a great deal of attention. Since the inception of the Fund, commentators have been drawn to speculating about its future significance,[2] particularly whether the Fund will be used as a model for tort reform and whether the policy choices made with respect to administrating the

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1. The Fund was passed as Title IV of the Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 401-409, 115 Stat. 230, 237-41 (2001) (codified in scattered sections of 49 U.S.C.) (the "Air Safety Act"). In establishing the Fund, the United States Department of Justice published a Notice of Inquiry and Advance Notice of Rulemaking on November 5, 2001 seeking "public comment on a range of matters critical to [implementation of the] program that will carry out the intent of the legislation of providing compensation to victims." September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 55,901, 55,901 (Nov. 5, 2001). The Interim Final Rule was published December 21, 2001. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274 (Dec. 5, 2001) (codified as amended at 28 C.F.R. pt. 104 (2003)) [hereinafter Interim Rule]. The Final Rule was published on March 13, 2002. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233 (Mar. 13, 2002) (codified at 28 C.F.R. pt. 104 (2003)) [hereinafter Final Rule]. The Fund is slated to expire when all claims have been processed.

The deadline for filing a claim with the Fund was December 22, 2003. September 11th Victim Compensation Fund of 2001, 28 C.F.R. § 104.62 (2003). Over 97% of eligible families ultimately decided to file with the Fund. Fifty of the 2976 eligible families failed to file either a lawsuit or a claim with the Fund. David W. Chen, *Man Behind Sept. 11 Fund Describes Effort as a Success, With Reservations*, N.Y. TIMES, Jan. 1, 2004, at B1.

2. *See, e.g.*, Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 CLEV. ST. L. REV. 573, 587-89 (2001) (stating that "government intervention to provide no-fault benefits remains a chancier proposition" than traditional tort law); Larry S. Stewart et al., *The September 11th Victim Compensation Fund: Past or Prologue?*, 9 CONN. INS. L.J. 153, 171 (2002) (suggesting that the Fund will "not likely serve as a model for future 'reform' of the American civil justice system"); Georgene Vairo, *Remedies for Victims of Terrorism*, 35 LOY. L.A. L. REV. 1265, 1284 (2002) (stating that the success or failure of the Fund "will be closely watched . . . because of the precedent it has established in terms of Congressional intervention into the tort process"); Cynthia C. Lebow, *Understanding the September 11th Victim Compensation Fund: The Proper Response or a Dangerous Precedent?*, *in* 1 ATLA ANNUAL CONVENTION REFERENCE MATERIALS 243 (ATLA ed., 2002), WL 1 Ann. 2002 ATLA-CLE 243.

Fund are desirable and deserve to be replicated. It is not so much that people expect Congress or the states to enact similar compensation schemes anytime soon to deal with the many other disasters and crises that jeopardize the lives and health of accident victims.[3] Rather, it is that the Fund is likely to become a benchmark of sorts for what constitutes appropriate compensation in tandem with, or perhaps in contrast to, compensation in tort.

The focus of this Article is quite narrow. I examine some little-known features of the Fund that are particularly relevant to rethinking and reassessing the element of damages in injury and compensation law. Particularly because so many of the victims of September 11th died,[4] the Fund has special importance for damages in wrongful death cases, thus providing a rare opportunity to reflect on how the law measures the value of a person's life, while simultaneously providing for the needs of those left behind.

Despite its practical importance, the law of wrongful death is a subject that seldom captures the imagination of torts scholars.[5] The recent literature, for example, has little to say about fundamental questions of social policy connected to wrongful death recovery, such as what constitutes a "family" or whether compensation should be reserved exclusively for surviving economic dependents or should be more broadly available to persons who have legal rights in a deceased's estate. Nor is there currently a live debate as to whether wrongful death recovery should be thought of primarily in individual terms (as compensating for what the deceased individual lost) or in collective terms as a mechanism for providing financial security for the survivors (as compensating for the losses of family members).

In this Article, I focus on specific features of the Fund that bear upon these fundamental questions. After a brief excursion into the genesis of the Fund, I look at the process for calculating economic and noneconomic damages to see whether there is any discernible philosophy underlying the Fund which we might draw upon in the future.

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3. The fate of one major piece of proposed federal legislation that would create a fund to compensate asbestos victims is uncertain because the contending forces have yet to determine the size of pay-outs to claimants. *See Panel Adds Money to Asbestos Fund; Payments Still at Issue*, CHI. TRIB., June 27, 2003, § 3, at 4.

4. By latest count, 2749 persons died in the attacks on the World Trade Center, the Pentagon, and in the Shanksville, Pennsylvania crash. *Death Toll at 2,749*, L.A. TIMES, Jan. 24, 2004, at A1. An additional 2337 persons were injured but survived the attacks. Martin Kasindorf, *Some 9/11 Families Choose Lawsuits over Federal Fund*, U.S.A. TODAY, July 14, 2003, at 1A.

5. One notable recent exception is John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 731-49 (2000) (discussing the historical development of wrongful death statutes).

I. POLITICAL AND LEGAL CONTEXT OF THE FUND

Perhaps the most repeated observation made about the September 11th Victim Compensation Fund, like the horrible events which brought it into being, is that it is unique and has no close parallel in the history of United States injury and compensation law.[6] At first blush, because the Fund is a no-fault scheme,[7] it might seem superficially to resemble workers' compensation or automobile no-fault systems. The differences in these schemes, however, are too significant to make the analogy appropriate.

First, the Fund is not an exclusive remedy. Victims may decide to opt out, waive their right to compensation under the Fund, and sue in tort instead.[8] Although Congress provided disincentives for victims to sue by limiting liability in tort[9] and provided a single venue for all claims,[10] some suits have nevertheless been filed.[11] Particularly for those families of victims who intend to use the tort litigation to discover facts about the highjackings and the inadequacy of security measures taken by the airlines and other potential defendants, a lawsuit offers something that the Fund was not set up to do.[12]

Second, the Fund is an event-based rather than a status-based scheme.[13] It is unlike workers' compensation, for example, in which the injured party's status as an employee and his or her ongoing relationship to the employer trigger the right to compensation. This feature of the Fund may mean that its

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6. *See, e.g.*, Linda S. Mullenix & Kristen B. Stewart, *The September 11th Victim Compensation Fund: Fund Approaches to Resolving Mass Tort Litigation*, 9 CONN. INS. L.J. 121, 123-26 (2002).

7. *See* Air Safety Act, Pub. L. No. 107-42, § 405(c), 115 Stat. 230, 239-40 (2001) (eligibility requirements).

8. *See* Air Safety Act § 405(c)(3)(B)(i), 115 Stat. at 240.

9. Importantly, liability for the airlines was capped at the limits of the liability insurance coverage maintained by the air carrier. *See* Air Safety Act § 408(a), 115 Stat. at 240. In subsequent legislation, a similar cap tied to insurance coverage was placed on suits against aircraft manufacturers, property owners in the World Trade Center, airport owners and governmental entities. *See* Aviation and Transportation Security Act, Pub. L. No. 107-71, § 201(b)(2), 115 Stat. 597, 645-46 (2001) (codified in scattered titles of the U.S.C.).

10. An exclusive federal forum was created in the U.S. District Court for the Southern District of New York. *See* Air Safety Act § 408(b)(3), 115 Stat. at 241.

11. For example, in the three days close to the second anniversary of the September 11th attacks, over 50 lawsuits were filed. Kara Scannell & Jess Bravin, *Flurry of Lawsuits Mark Anniversary of Sept. 11 Attacks*, WALL ST. J., Sept. 11, 2003, at A3. New York residents have until March 2004 to file wrongful death suits. *Id.* Just before the deadline for filing with the Fund, however, forty people who had originally filed lawsuits decided to file with the Fund, reducing the total number of lawsuits to thirty-nine. Chen, *supra* note 1, at B1.

12. Interview with Attorney Mary Schiavo and Jacques Debeuneure, *The Early Show* (CBS television broadcast, July 31, 2003) (discussing waiving financial aid from victim compensation fund in order to sue airlines and others for 9/11 attacks).

13. *See* Robert L. Rabin, *Indeterminate Future Harm in the Context of September 11*, 88 VA. L. REV. 1831, 1838 (2002).

influence will ultimately be quite limited, amounting to little more than a footnote in the torts casebooks, similar to the impact of such programs as the childhood vaccine compensation fund.[14] Creation of the Fund certainly has raised questions about the "horizontal" equity of providing compensation for this particular group of terrorist attack victims, when no compensation is available for victims of the Oklahoma City bombing or for those persons injured in non-terrorist catastrophes like mining disasters.[15]

Third, the Fund is unusual in that it provides a fairly generous recovery for economic losses and also some award for noneconomic losses to survivors and families of victims.[16] Significantly, the average award under the Fund is approximately $1.5 million, tax-free.[17] The usual *quid pro quo* for receiving no-fault benefits is that the injured party must give up the right to recover noneconomic damages in exchange for a speedy recovery of economic damages and elimination of the need to prove negligence.[18] Moreover, under workers' compensation schemes, for example, the amounts of recovery even for economic losses have been lower than recovery in tort; typically, workers' compensation claimants recover only a portion of their lost wages.[19] As someone who has written about the importance of noneconomic damages in tort law,[20] I am intrigued by the unusual mix of economic and noneconomic damages available under the Fund.

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14. *See* Mullenix & Stewart, *supra* note 6, at 133-34 (referring to The National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3756 (codified as amended at 42 U.S.C. § 300aa (2000))).

15. *See* Stewart et al., *supra* note 2, at 165-67 (discussing unsuccessful legislative efforts to expand Fund coverage to include victims of other terrorist attacks).

16. The Special Master of the Fund has described it as providing "an *unprecedented* level of federal financial assistance for surviving victims and the families of deceased victims." Final Rule, *supra* note 1, at 11,233.

17. Interview with Kenneth Feinberg, *American Morning* (CNN television broadcast, Sept. 11, 2003).

18. For example, workers' compensation benefits generally cover only economic losses (medical bills, wage replacement, and rehabilitation) and provide no recovery for pain and suffering, loss of enjoyment of life, or other non-pecuniary losses. *See* 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 100.05 (2003). Similarly, under the typical automobile no-fault plans, only economic losses are provided. *See* Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611, 622-23 (2000).

19. For example, the weekly benefit for workers who are totally disabled is typically computed by multiplying their pre-injury average weekly wages by 50% to 66.67%, up to a maximum amount set by state law. 5 LARSON & LARSON, *supra* note 18, § 93.01[1][a]. The maximum amounts are generally set as a percentage of the state's average weekly wage. *See* 5 *id.* § 93.04[1]-[2].

20. *See* Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 528-30 (1998) [hereinafter *The Architecture of Bias*]; Martha Chamallas with Linda K. Kerber, *Women, Mothers and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).

Fourth and finally, the origin of the Fund indicates that it was designed as much to bail out the airlines as to compensate the victims of the attacks.[21] The Fund is financed with general revenues from the federal treasury,[22] in contrast to workers' compensation, which is typically financed by employers through the purchase of insurance.[23] Thus, when an award is made under the Fund to a 9/11 victim, neither the airlines nor any other potentially negligent actor will be affected either directly or indirectly. This method of funding takes away the deterrent effect of any recovery from the Fund.

These peculiar features of the Fund provide a revealing comparison and contrast to both traditional tort recovery and prototypical no-fault schemes. The Fund gives us an opportunity to imagine what the contours of compensation might look like if two important considerations were met: (1) if we were not concerned with deterring behavior by the defendant; and (2) if we regarded the victim as a worthy claimant who deserved compensation. The Fund thus allows us to focus on the "damages element" of injury law, freed from issues of liability that often overshadow the damages element in tort litigation.

In media reports about the Fund and in comments submitted during the administrative process that followed passage of the legislation creating the Fund, fundamental questions about the basic objectives of personal injury compensation surfaced that rarely get debated, even in first-year torts classes. Critics and supporters alike asked difficult, policy-laden questions like: Should the life of a stock broker be worth more than the life of a waiter?[24] Should the particular circumstances surrounding a person's death matter?[25] How should the pain and suffering and other losses of family members be evaluated?[26]

For the most part, Congress had little specific to say about these questions or about the general compensation philosophy underlying the Fund. In its haste to establish the Fund to provide immediate economic relief to the airlines, Congress left most of these important policy choices to Kenneth R.

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21. *See* Mullenix & Stewart, *supra* note 6, at 127.

22. *See* Air Safety Act, Pub. L. No. 107-42, § 406(b), 115 Stat. 230, 240 (2001).

23. Depending on the state, employers may purchase workers' compensation insurance through a private insurance carrier or from a state workers' compensation fund, or they can self-insure and pay workers directly. Approximately 63% of benefits are paid by private insurance carriers, with state funds and self-insurance accounting for about 23% and 14% respectively. *See* NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAW, REPORT OF NATIONAL COMMISSION (1972), *reprinted in* 10 LARSON & LARSON, *supra* note 18, app. E, at 21.

24. *See* Emily Bazelon, *Equal Pay for Equal Death: Does the 9/11 Fund Think Bankers Matter More Than Electricians?* (July 1, 2002), Microsoft Network, *at* http://www.slate.msn.com/id/2067575/.

25. *See* Final Rule, *supra* note 1, at 11,237-38.

26. *See id.* at 11,239 (discussing comments received regarding how the distinctive pain and suffering of victims and family members ought to be evaluated).

Feinberg, the person appointed as Special Master of the Fund.[27] Many thought that Mr. Feinberg was the ideal choice for the position. He had earned a reputation for his skillful handling of mass tort cases, including Agent Orange, diethylstilbestrol (DES), Dalkon Shield, and asbestos; and, as Senator Edward Kennedy's former chief of staff, he was not likely to be opposed by Democrats in Congress.[28] Not surprisingly, however, as Mr. Feinberg set about his job of administering the Fund, he became a more controversial figure.[29]

A New York Times article by Lisa Belkin, written shortly after the Fund was established, explains the politics that brought the Fund into being and provides insight into the cross-cutting values expressed by the Act.[30] Ms. Belkin recounts that shortly after September 11th, the airlines advised the President and Congress that, due to the losses they incurred as a result of the attacks and its aftermath, they might have to stop flying unless Congress subsidized the industry to a significant degree.[31] From the outset, a primary function of the legislation was to provide relief for the airlines industry, including tort immunity.[32] Specifically, the White House wanted to limit the liability of the airlines to the amount of insurance that they carried. However, Democrats in Congress refused to allow such limitation unless there was also a mechanism for compensating victims.[33] Congress quickly compromised and combined the two approaches. Under the Act, victims would be able to recover, without proof of fault, from a Fund financed by the federal government.[34] If they chose to sue in tort, however, the airlines' liability would be limited by the amount of insurance carried.[35]

The victims' choice of whether to receive compensation under the Fund or to sue in tort has been a difficult one because of the risk that only those who are first to sue will actually receive compensation before the available insurance funds are depleted. Moreover, those who opt to sue confront the very real difficulty of proving liability based on negligence. Family members suing for the death of passengers on the planes may find it relatively easy to prove that the injuries suffered were foreseeable, a showing related to proof of both negligence and proximate cause. Those suing on behalf of persons who perished in the towers or on the ground, however, will likely find it more

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27. *See* Elizabeth Kolbert, *The Calculator: How Kenneth Feinberg Determines the Value of Three Thousand Lives*, THE NEW YORKER, Nov. 25, 2003, at 42.

28. *See id.* at 43-44.

29. *See* Lena H. Sun, *Take a Number: The Sept. 11 Fund Mediator, Putting a Dollar Sign on Death's Toll*, WASH. POST, Mar. 11, 2002, at C1, C8 (describing Mr. Feinberg's self-confident, brusque style).

30. Lisa Belkin, *Just Money*, N.Y. TIMES, Dec. 8, 2002, § 6 (Magazine) at 92.

31. *Id.* at 94.

32. *Id.*

33. *Id.*

34. Air Safety Act, Pub. L. No. 107-42, § 405(c), § 406(b), 115 Stat. 230, 239-40 (2001) (eligibility requirements and source of funding).

35. Air Safety Act § 408(a), 115 Stat. at 240.

difficult to convince a factfinder that it was foreseeable that a plane would be used as a missile.[36]

For victims who choose compensation under the Fund, an award is guaranteed and only the amount of the award is at issue. Under the broad congressional mandate, the Special Master of the Fund has enormous discretion, more than is usually given to a judge or jury. In general terms, the legislation provides that the amount of compensation shall be based on "the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant."[37] This broad language gives the Special Master the ability to consider the financial need of surviving family members, as well as particulars of the death and earning capacity of the deceased. As designed, the Fund compensates only for physical injury or death. Awards are restricted to an individual (or personal representative of a deceased individual[38]) who was physically injured or killed as a result of the attacks,[39] thus excluding persons who suffered only mental distress, property damage, economic loss, or exposure to toxins that might cause disease in the future.

In two key respects, however, Mr. Feinberg's discretion was curtailed. First, Congress provided that there would be a deduction for the sums which claimants received from collateral sources, including "life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments"[40] related to the attacks. On this point, the legislation looks more like a typical tort reform measure where the collateral source rule has long

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36. *See In re* September 11 Litig., 280 F. Supp. 2d 279, 296 (S.D.N.Y. 2003); *see also* Marshall S. Shapo, *Compensation for Victims of Terror: A Specialized Jurisprudence of Injury*, 30 HOFSTRA L. REV. 1245, 1247 (2002); Anthony J. Sebok, *Defending the September 11th Victim Compensation Fund: Why in the End, The Plan is Fair to All*, (Feb. 11, 2002), FindLaw.com, *at* http://www.srit.news.findlaw.com/sebok/20020211.html. However, approximately 70 victims and their representatives who filed suit against the airlines, airport security companies, an airplane manufacturer, and the owners and operators of the World Trade Center recently withstood a motion to dismiss their claims. *See September 11 Litig.*, 280 F. Supp. 2d at 287. The court ruled that the claims of both the passengers on the hijacked planes and persons on the ground could proceed, finding that the defendants owed a duty even to persons on the ground and that the intervening criminal acts of the terrorists did not break the chain of causation as a matter of law. *Id.* at 295-97.

37. Air Safety Act § 405(b)(1)(B)(ii), 115 Stat. at 238.

38. The personal representative is defined as "an individual appointed by a court of competent jurisdiction as the Personal Representative of the decedent or as the executor or administrator of the decedent's will or estate." *See* Interim Rule, *supra* note 1, at 66,277. Once the award is granted under the Fund, the personal representative is to distribute the award consistent with: (1) the deceased's will; (2) state law governing intestate succession; or (3) a court ruling in the state where the victim was domiciled. *Id.* However, the rules provide that if the Special Master determines that such distribution will not adequately compensate the deceased's spouse, children, or other relatives, he may intervene and order a different distribution. *Id.*

39. Air Safety Act § 405(c), 115 Stat. at 239.

40. Air Safety Act §§ 402(4), 405(b)(6), 115 Stat. at 237-38.

been under attack.[41] The notable effect of this limitation is that some families might not be entitled to an award of any amount under the Fund if collateral sources cover all their authorized losses.[42] Second, Congress expressly prohibited the award of punitive damages under the Fund.[43] This restriction has proved less controversial than the first, despite the debate that usually accompanies the topic of punitive damages.[44] Because the Fund offers no possibility for deterrent or punitive effects, the usual rationales for allowing such non-compensatory monetary damages are inapplicable.

Overall, the legislation and the rules adopted pursuant to the legislation create a curious hybrid system: it is partly a social insurance fund, resembling the standard no-fault plan, and partly a process for individualized justice that is more tort-like in character.[45] Professor Robert Rabin believes that the dual nature of the plan is fitting because it reflects the "love-hate relationship" Americans have with the tort system.[46] I interpret this remark to mean that when it comes to the torts system, Americans are deeply ambivalent. On the one hand, we love it ("it provides justice for the individual"). On the other hand, the love affair lasts only until the victim collects. It is at this point that hostility towards the system and its beneficiaries tends to surface ("they're greedy, it's a lottery") and the legitimacy of awards begins to be questioned.

II. CONTROVERSIAL CHOICES: THE ADMINISTRATIVE RULES

The most interesting aspects of the Fund are found not in the statutory provisions but in the administrative rules that Mr. Feinberg subsequently fashioned to guide his discretion.[47] Although claimants may elect to secure an

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41. In approximately half the states, tort reform statutes have changed the collateral source rule in some categories of tort cases. *See* 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES § 3.8(1), at 376 (2d ed. 1993). Under New York law, for example, collateral sources are generally deductible, except for life insurance. Plaintiffs, however, may recover an amount equal to the cost of premiums paid for two years prior to the accident and an amount equal to the cost of maintaining coverage. *See* N.Y. C.P.L.R. § 4545(c) (McKinney Supp. 2003).

42. Mr. Feinberg has taken the position that the Act does not permit him to create a mandatory legal rule requiring a minimum payout *after* collateral source deductions. However, he has announced that he will exercise his discretion to consider the needs of a victim's family to assure that only rarely will a claimant receive less than $250,000, and then only in cases where the family has received very substantial compensation from collateral sources. *See* Victim Compensation Fund Frequently Asked Questions § 5.9, U.S. Dep't of Justice, *available at* http://www.usdoj.gov/victimcompensation/faq5.pdf (last modified Dec. 19, 2003).

43. Air Safety Act § 405(b)(5), 115 Stat. at 239.

44. *See, e.g., Reforming Punitive Damages: The Punitive Damage Debate*, 38 HARV. J. ON LEGIS. 469 (2001) (symposium issue).

45. The Special Master has stated that "no single analogy should dictate the compensation under the Fund." Final Rule, *supra* note 1, at 11,237.

46. *See* Rabin, *supra* note 2, at 576.

47. *See supra* note 1.

individualized hearing if they are not satisfied with the award yielded by the rules,[48] the rules provide a critical starting point for compensation. This section of my Article zeroes in on those rules designed to aid in the calculation of damages. I am most concerned with rules that have distributional or social consequences—that is, those rules that embody choices that tend to advantage or to disadvantage affluent versus less privileged victims, that tend to favor married over single persons or unmarried couples, or that tend to have a special impact on women.

These policy choices are not always apparent on the face of the regulation but are embedded in three points in the regulations: (1) the rules governing presumed economic losses;[49] (2) the provisions relating to calculation of future earning potential of female victims and the valuing of homemakers' contributions;[50] and (3) the approach taken with respect to calculating noneconomic losses.[51] In many respects, the rules governing the Fund mirror policy choices found in traditional tort law, especially with respect to the calculation of economic losses. In other respects, however, most specifically when it comes to the award of noneconomic damages, the rules depart markedly from tort law and point to very different conceptions of equity and entitlement.

A. Presumed Economic Losses

For most claimants, the most significant portion of their award will be the amount they receive to compensate for economic losses sustained due to the death of the victim.[52] To give potential claimants an estimate of how much they should expect to be awarded under the Fund, Mr. Feinberg devised a "presumed award" chart or grid to calculate economic losses.[53] The grid is based primarily on the age and prior income level of the victim.[54] It follows

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48. Interim Rule, *supra* note 1, § 104.33, at 66,285 (codified as amended at 28 C.F.R. § 104.43 (2003)).

49. *See id.* §§ 104.43, 104.45, at 66,286 (codified as amended at 28 C.F.R. §§ 104.43, 104.45 (2003)).

50. *See id.* § 104.43(c), at 66,286 (codified at 28 C.F.R. § 104.43(c) (2003)).

51. *See id.* §§ 104.44, 104.46, at 66,286-87 (codified at 28 C.F.R. §§ 104.44, 104.46 (2003)).

52. To date, the average award under the Fund has been approximately $1.5 million. *See supra* note 17 and accompanying text. The amount for noneconomic damages is set at $250,000 for each decedent, with an additional $100,000 for each spouse or dependent. 28 C.F.R. § 104.44. Thus, if a victim left a spouse and one child, the survivors would receive $450,000 in noneconomic damages. To reach the average award, that family would then have to receive $1,050,000 in economic damages.

53. *See* Interim Rule, *supra* note 1, § 104.43-.45, at 66,286 (codified as amended at 28 C.F.R. § 104.43-.45 (2003)); Final Rule, *supra* note 1, at 11,236-42.

54. *See* Interim Rule, *supra* note 1, § 104.43, at 66,286 (codified as amended at 28 C.F.R. § 104.43 (2003)).

a basic principle in tort compensation, namely, that the calculation of economic damages is designed to restore victims (or, in cases of wrongful death, the families of victims) to the position they were in before the accident.[55] This "status quo ante" feature of the grid means that the "disparity" in the valuing of a human life that is built into the torts system is replicated in the award of economic losses through the Fund. For example, the families of high-earning stock brokers will generally receive a much higher award than the families of lower-earning waiters.

Under the grid, in cases involving a claim based on the death of the victim, a percentage is deducted that represents the amount that the deceased would have spent on personal consumption during his or her lifetime.[56] The theory behind the "personal consumption" deduction is that the family is not entitled to recoup that amount because the deceased would not have used it to defray household expenses or to pay for other needs of the survivors.[57] To this extent, the personal consumption deduction seems to embrace the perspective of the survivors and seeks to determine what the family (as opposed to the victim) has lost as a result of the death.

The personal consumption deduction is also a standard feature in wrongful death litigation,[58] although there is no uniformity among the states as to the

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55. *See* DAMAGES IN TORT ACTIONS §1.01 (2003) (defining the primary purpose of tort damages as an effort to "place the injured party in the same position that party would have occupied had the wrong not occurred"); 1 DOBBS, *supra* note 41, § 3.1, at 281 ("[D]amages is an instrument of corrective justice, an effort to put plaintiff in his or her rightful position.").

56. Final Rule, *supra* note 1, at 11,238; *see* 28 C.F.R. § 104.43(a); U.S. DEP'T OF JUSTICE, EXPLANATION OF PROCESS FOR COMPUTING PRESUMED ECONOMIC LOSS 3 (Aug. 27, 2002), *available at* http:www.usdoj.gov/victimcompensation/vc_matrices.pdf. When the injured party survives, there is no personal consumption deduction. In such cases of personal injury, presumably the victim still needs to consume goods throughout his or her life and thus may appropriately demand compensation to offset these continuing needs.

57. The explanation of the process for computing presumed economic loss that appears on the Fund's website states that "[t]his subtraction [for personal consumption] is a standard adjustment in evaluating loss of earnings in wrongful death claims because some amount of the income the victim would have contributed to the household would have been consumed personally by the deceased and not available to other household members." EXPLANATION OF PROCESS FOR COMPUTING PRESUMED ECONOMIC LOSS, *supra* note 56, at 3; *see also* Kent C. Krause & John A. Swiger, *Analysis of the Department of Justice Regulations for the September 11th Victim Compensation Fund*, 67 J. AIR L. & COM. 117, 126-27 (2002).

58. Krause & Swiger, *supra* note 57, at 127. The authors conclude that there are no material differences between the method used to calculate the personal consumption deduction under the Fund and traditional tort law. *Id.* Under the Fund, however, the personal consumption deduction is applied to after-tax (rather than pre-tax) income, a feature that serves to lower the amount of the consumption offset. *See* Final Rule, *supra* note 1, at 11,238. The fact that the personal consumption deduction is a standard feature in tort law and is generally endorsed by forensic economics recently led a federal district court to conclude that its adoption by Mr. Feinberg was not outside his authority under the Air Safety Act. *See* Colaio v. Feinberg, 262 F. Supp. 2d 273, 298-301 (S.D.N.Y. 2003).

precise method to be used for its calculation.[59] Moreover, following the typical practice in tort litigation, under the Fund's presumed award charts, personal consumption rates are much higher for single decedents without dependents than they are for persons who die leaving a spouse or dependents.[60] Thus, for example, the personal consumption rate for a single person without dependents who earns $60,000 per year is 61.7%, while the comparable rate for a married decedent with a spouse or for a decedent leaving one dependent child is 17.8%.[61] As a result, the presumed award calculated for a single decedent (with no surviving children) is much lower than it is for a married decedent of the same age and income profile.[62] For example, the presumed economic and noneconomic loss for a single decedent, age 40, earning $60,000 with no dependents is $686,071, as compared to $1,286,483 for a married decedent with no dependent children.[63] Although this disparity in awards for single versus married victims was criticized by persons submitting comments during the rulemaking process,[64] Mr. Feinberg chose not to alter this feature of the grid.

The principal reason why there is such a dramatic difference between the size of the personal consumption deduction for single decedents with no dependents compared to married persons (or single persons with dependents) can be found in the formula used to calculate the deduction. For married persons or single persons with dependents, the personal consumption deduction is calculated as a share of certain expenditure categories—specifically, the decedent's share of food, apparel and services, transportation, entertainment, personal care products and services, and

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59. *See* Thomas O. Depperschmidt, *A Law and Economics Perspective on the Personal Consumption Deduction in Wrongful Death Litigation*, 7 J. OF LEGAL ECON. 1, 2 (1997-98) (describing various methods for calculating personal consumption deduction among the states).

60. *See* EXPLANATION OF PROCESS FOR COMPUTING PRESUMED ECONOMIC LOSS, *supra* note 56, at Table 4.

61. *Id.*

62. *See id.* at Tables 4 & 5.

63. *Id.* at Table 5. Similarly, a single decedent leaving a dependent child is presumed to have $1,028,998 in losses. *Id.*

64. *See* Individual Comment on Interim Rule from New York, N.Y., N002263 (Jan. 28, 2002), U.S. Dep't of Justice, *available at* http://www.usdoj.gov/victimcompensation/interim/njan28/N002263.html (expressing concerns for the plight of unmarried domestic partners and engaged persons); Individual Comment on Interim Rule from Garden City, N.Y., N002368 (Jan. 22, 2002), U.S. Dep't of Justice, *available at* http://911digitalarchive.org/doj/emails/N002368.html ("If a victim was engaged to be married the chart showing Married Decedent with No Dependent Children should be used."); Individual Comment on Interim Rule from Avon, Conn., N001927 (Jan. 17, 2002), U.S. Dep't of Justice, *available at* http://www.usdoj.gov/victimcompensation/interim/njan23/N001927.html ("The disparity is far too great without a reasonable explanation. It would appear that the single person is being discriminated against.").

miscellaneous expenses.[65] However, for single persons without dependents, the all-important categories of housing, education, and health are also included.[66] This means, for example, that for a single decedent without dependents, amounts spent on rent or mortgage payments for a residence will be deducted from the award because it forms part of the personal consumption deduction. For married decedents, however, there is no deduction for housing expenses, not even for a portion representing the decedent's "share."[67]

The document explaining the calculation of the personal consumption deduction that appears on the Fund's website does not give a reason why a different set of categories is used for the two groups.[68] However, a likely explanation lies in the concept of "public goods" and in the acceptance of what forensic economists call the "survivors' standard of living method" that is used to calculate the personal consumption deduction.[69] In the context of a household, a "public" or "common" good is defined as an important item that is indivisible, in the sense that it is difficult to assign a share of the good to the individual household members. A refrigerator is an example of such a public good—one economist explains that it is hard for survivors to do without a refrigerator and that "realistically, there is no such thing as a fraction of a refrigerator."[70]

At first blush, it would seem that housing would also fall within the "public goods" category because it is an important item that cannot easily be divided after a family member's death. When a family member dies, survivors must still have shelter and cannot easily retain only their portion of the house or the apartment. However, in another sense, housing costs may be divisible. It is not difficult to conceive of a method that would assign the decedent a share of the housing costs, for example, by dividing the amount of rent by the number of adults living in a household. Excluding such a significant expense from the personal consumption calculation may thus seem unrealistic, and such exclusion has not escaped criticism.[71] It is at this point in the analysis that the survivors' standard of living method for calculating the personal consumption deduction comes into play. The theory underlying the method is that survivors are entitled to the same standard of living as they enjoyed before the death of the income earner.[72] The model is based on a prototype of

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65. *See* EXPLANATION OF PROCESS FOR COMPUTING PRESUMED ECONOMIC LOSS, *supra* note 56, at 2. The expenditure data was based on a table published by the Bureau of Labor Statistics in 1999.

66. *Id.* at 3.

67. *Id.*

68. *Id.*

69. *See* Depperschmidt, *supra* note 59, at 5.

70. *Id.* at 6 (citing GERALD A. MARTIN, DETERMINING ECONOMIC DAMAGES (1995)).

71. For example, Professor Depperschmidt argues that under the logic of the survivors' standard of living method, no one ends up paying for the household's public goods. *Id.* at 7.

72. *Id.*

the death of a principal breadwinner (often described in gendered terms as the "father") who leaves behind dependents (also often described in gendered terms as the "wife and children"). Under the model, a convincing argument can be made that to insure that the family's standard of living is not lowered upon the death of the principal breadwinner, no deduction representing the cost of housing should be made from an award. By thus keeping the personal consumption deduction low, there is a greater chance that the family will not have to change residences after the death and may continue living in the family home.[73]

The decision to exclude housing, health, and education as categories of expenditures used to calculate the personal consumption deduction under the Fund seems consistent with the public goods concept and the survivors' standard of living method for calculating the personal consumption deduction.[74] Although there is some question as to whether housing, health, and education are truly indivisible, each category represents expenditures that are important to a family's well-being and the sharp curtailment of funds for them after a family member's death would likely disrupt a family's standard of living. The important point here is that buried in the intricacies of calculating the personal consumption deduction—in both torts and under the Fund—lies a policy decision to depart from an individualistic measure of a person's worth and to dispense significantly higher awards in death cases in which spouses or children are left behind.

1. Treatment of Same-Sex and Unmarried Couples

The disparity in the treatment of single versus married decedents has important implications for same-sex and unmarried heterosexual couples.[75] The administrative rules give the right to claim compensation under the Fund to the deceased victim's "personal representative," the term of art used to describe the person who represents the victim's estate.[76] In those cases in

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73. *See* DAMAGES IN TORT ACTIONS, *supra* note 55, § 111.21 ("Housing is generally excluded in the determination of the deceased's cost of maintenance on the assumption that the surviving family members would not be expected to move to a smaller home once the deceased is gone. Indeed, the goal of replacing and/or maintaining the family's living standard would appear to be defeated if the family were provided replacement support based on a decreased expenditure for housing.").

74. *See* Depperschmidt, *supra* note 59, at 5-9.

75. For a comprehensive discussion of the rights of same-sex partners under the Fund, see Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 TEMP. L. REV. 31 (2002). At least one news account has indicated that there were 22 known gay surviving partners of the terror attacks. *See* Jane Gross, *U.S. Fund for Tower Victims Will Aid Some Gay Partners*, N.Y. TIMES, May 30, 2002, at A1. Another news story cited a fiancee support group with 40 members. *See Q & A: 'She is Still Missing to Us'*, NEWSWEEK, May 30, 2002, *at* http://stacks.msnbc.com/news/759529.asp.

76. September 11th Victim Compensation Fund of 2001, 28 C.F.R. § 104.4 (2003).

which an unmarried domestic partner has been designated as the executor of the deceased's will, he or she would qualify as the personal representative with the right to decide whether to make a claim under the Fund. In cases in which the deceased died intestate, however, it is not clear that a domestic partner would qualify as the personal representative; instead, the determination is governed by the law of the state where the deceased was domiciled.[77] Thus, in some cases, the deceased's next of kin, rather than the domestic partner, would be afforded the right to decide whether to sue or to seek compensation under the Fund.

In May 2002, the New York legislature passed an unusual piece of legislation aimed at making it easier for domestic partners of victims to be named as personal representatives.[78] This Act's preamble declares that the legislature intended that domestic partners be able to file claims with the Fund and arguably allows Mr. Feinberg to interpret New York law as affording domestic partners the rights of personal representatives.[79] This legislation, however, affects only those victims who were domiciled in New York at the time of the attacks.

Additionally, the question of whether an unmarried domestic partner is entitled to receive payments from the Fund is distinct from the issue of determining the personal representative, although the end result may be the same. Under the Fund, personal representatives are bound to distribute the award in a manner consistent with either the deceased's will or the applicable state's law governing intestate succession.[80] Thus, when a domestic partner has been designated as a beneficiary under the decedent's will, he or she is likely to receive compensation. Only rarely, however, will a domestic partner be recognized under state law as an heir in cases in which the deceased dies

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77. Final Rule, *supra* note 1, at 11,242-43.

78. The September 11th Victims and Families Relief Act, 2001 N.Y. Laws 11290. The text of the September 11th Victims and Families Relief Act describes its legislative intent as providing that:

> domestic partners of victims of the terrorist attacks are eligible for distributions from the federal victim compensation fund . . . and other existing state laws, regulations, and executive orders should guide the federal special master in determining awards and ensuring that the distribution plan compensates such domestic partners for losses they sustained.

2001 N.Y. Laws 11290, § 1.

79. 2001 N.Y. Laws 11290, § 1. One news account states that in cases in which the next of kin of the deceased pose no objection, Mr. Feinberg has indicated that the domestic partner is all but assured of receiving an award. In situations when the next of kin is not supportive of the domestic partner, Mr. Feinberg has indicated that he will review the case individually, taking into account that the legislature and Governor of New York have expressed their desire to support same-sex partners. *See* Gross, *supra* note 75, at A1.

80. 28 C.F.R. § 104.52 ("The Personal Representative shall distribute the award in a manner consistent with the law of the decedent's domicile or any applicable rulings made by a court of competent jurisdiction.").

without a will.[81] In such cases of intestate succession, the personal representative may not be obliged to distribute the award to the domestic partner.[82]

The final wrinkle in determining the treatment of domestic partners under the Fund involves the interplay of the personal consumption deduction with the designation of same-sex or unmarried couples as single persons under the law. As mentioned previously, the presumed economic loss for a single decedent is significantly lower than it is for a married person with the same age and income profile.[83] This disparity means that even if a domestic partner is entitled to an award under the Act, the award will be less than if the couple had been married.[84] To this extent, the economic dependency of same-sex or other domestic partners is not given the same value or recognition that spouses receive. Neither tort law nor the Fund acknowledges the fact that the standard of living of a domestic partner who shared a household with the decedent will be adversely affected by a lower award—an award that is produced by applying the personal consumption deduction established for single persons.

The disparity in awards between same-sex (or unmarried) couples and married couples reflects the Fund's ambivalent attitude toward gay families and its lingering sexist and heterosexist notions of dependency. Mr. Feinberg has made it clear through his public statements that he is not hostile to gay partners and may be inclined to exercise his discretion in individual cases to aid same-sex partners.[85] However, the protection given by the rules to same-sex partners is limited and depends to a large extent on whether the couple took advantage of estate planning measures prior to the attacks.[86] Importantly, Mr. Feinberg took no action to erase this disparity in awards; for example, he could have declared that decedents who died leaving a domestic partner would

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81. Only a few states allow domestic partners to benefit from state intestate succession laws. *See, e.g.*, CAL. PROB. CODE §§ 6401(c), 6402 (Supp. 2003) (providing inheritance rights for domestic partners); HAW. REV. STAT. §§ 560:2-102, 572c (2003) (granting rights and obligation conferred through marriage to reciprocal beneficiaries); VT. STAT. ANN. tit. 15, § 1204(e)(1) (applying intestate succession laws to parties in a civil union).

82. For victims domiciled in New York, special legislation providing that domestic partners are eligible to receive distributions under the Fund may suffice to provide Mr. Feinberg with the necessary authorization under state law to assure that domestic partners receive an award. *See* 2001 N.Y. Laws 11290.

83. *See supra* notes 60-64 and accompanying text.

84. Of course, Mr. Feinberg can exercise his discretion to alter an award if the claimant requests individualized consideration. *See* 28 C.F.R. § 104.33.

85. *See supra* note 79.

86. Similarly, Congress passed a bill extending the $250,000 federal death benefit to domestic partners of firefighters and police officers who died in the line of duty. The bill was named after Mychal Judge, the chaplain of the New York Fire Department who died on September 11. Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act of 2002, Pub. L. No. 107-196, 116 Stat. 719 (2002). However, the benefit is accorded only to partners named as a beneficiaries of victims' life insurance policies.

be treated as "married" for purposes of determining the personal consumption deduction.[87] Instead, the Fund relies on the grid for determining awards and systematically disadvantages same-sex couples in a way that is hidden from view by application of the personal consumption deduction. The operation of the Fund is thus an illustration of a "neutral" stance toward same-sex and unmarried couples that translates into material disadvantage, at least if the yardstick used is the treatment accorded married couples.

The disparity in treatment between married and single persons also highlights a basic tension in the values underlying wrongful death awards under the Fund. To a significant degree, the calculation of presumed economic loss reflects a desire to provide for survivors and to ensure that those who were economically dependent on the deceased do not suffer hardship. The "advantage" given to married decedents via the personal consumption deduction reflects a familiar model of dependency in which surviving spouses and minor children are presumed to be dependent, while other members of a household are presumed to be independent. In particular, the model of the survivors' standard of living is consistent with the idea that families (i.e., traditional families) are characterized by relations of economic dependency that ought to receive special recognition in the law.[88]

The question whether the grid is an equitable starting point for determining awards thus may depend on whether the relations of economic dependency in a given family actually comport with the assumptions embedded in the grid. Insofar as economically dependent same-sex partners are afforded less compensation than similarly situated married couples, the grid seems unfair. Basing the amount of compensation simply on whether the couple is married is arbitrary and reinforces the inequity of denying same-sex couples the right to marry.

It should be noted, however, that some might also object to the continued application of a survivors' standard of living approach in cases involving

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87. Such an adjustment in the application of the personal consumption tables would not have been inconceivable. Notably, when Mr. Feinberg received complaints that the standard tables for determining work-life expectancy disadvantaged women as a class, he decided to use the "male" tables for both male and female victims. *See infra* notes 116-19 and accompanying text.

88. *See* Depperschmidt, *supra* note 59, at 5-9. Some might contend that surviving spouses should be entitled to maintain their standard of living, regardless of whether they were economically dependent on their spouse during the marriage. The argument would be that, even if each spouse earned enough for self-support before the death, each had a legitimate expectation that he or she would continue to benefit from the income stream provided by the other spouse for the duration of the marriage. When the prototype shifts to a "dual-career" marriage, however, replacing the deceased spouse's lost contribution no longer seems as compelling and it may be difficult to distinguish such a case from, for example, the case of a single decedent who leaves his entire estate to his brother in his will. The question then becomes: Why should the personal consumption deduction be so much less in the case of a self-sufficient spouse than in the case of the brother?

married couples without children where each spouse earns a considerable income and neither spouse can be said to be dependent on the other. The larger debate lurking beneath the question of differing personal consumption rates for married and single persons is whether compensation ought to be keyed to the needs of the survivors, or should be more strictly a measure of the decedent's individual loss, without regard to the needs or identity of survivors.[89] In this regard, the Fund reflects the ambivalence found in tort doctrine governing compensation for death. Some states embrace a "wrongful death" approach that takes the perspective of survivors and seeks to provide for the needs of dependent family members. Other states use a "survival" or "loss to the estate" approach that seeks to recoup what the deceased victim could have accumulated over time and to reimburse the heirs, regardless of whether they were ever economically dependent upon the decedent.[90] With respect to the calculation of presumed economic loss, however, the Fund seems principally to reflect the survivors' needs perspective, with the notable exception of its failure to assure equal treatment for same-sex and unmarried couples.

2. Capping Economic Damages

In addition to the advantage given to married persons under the Fund, another important aspect of the presumed economic losses chart is that it determines presumed losses only up to a yearly salary level of $231,000, representing the 98th percentile of individual income in the United States.[91] Although Mr. Feinberg insists that this is not actually a cap because claimants may ask for a hearing and assert individualized circumstances,[92] he has also indicated that awards rarely will exceed three or four million dollars.[93]

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89. *See generally* RICHARD A. EPSTEIN, TORTS § 17.11.2, at 455 (1999) ("Is the emphasis on compensation for the perceived losses of current claimants or on the deterrence of total losses to all injured parties? The former leads to damage measures that focus on losses *to survivors*; the latter to rules that focus on losses *to the decedent's estate*.").

90. *See* 2 DOBBS, *supra* note 41, § 8.3(1), at 422-24 (distinguishing two approaches); WEX S. MALONE, TORTS: INJURIES TO FAMILY, SOCIAL AND TRADE RELATIONS § 2-9, at 44-45 (1979) (contrasting survival with wrongful death action).

91. *See* Final Rule, *supra* note 1, at 11,237.

92. Final Rule, *supra* note 1, at 11,234 (Supplementary Information: Statement by the Special Master) (codified at 28 C.F.R. pt. 104).

93. In his statement accompanying the Interim Rule, Mr. Feinberg expressed the view:

> [T]he purpose of the Act is not simply to examine economic and noneconomic harm, but also to provide compensation that is just and appropriate in light of claimants' individual circumstances. We have concluded that any methodology that does nothing more than attempt to replicate a theoretically possible future income stream would lead to awards that would be insufficient relative to the needs of some victims' families, and excessive relative to the needs of others.

Interim Rule, *supra* note 1, at 66,274.

Claimants dissatisfied with the presumptive award must argue that their individual case presents "extraordinary circumstances" that warrant a higher award.[94]

It is interesting that Mr. Feinberg is apparently worried about depleting the Fund, even though it is financed from general revenues and there is no limitation on the aggregate amount that may be awarded. This gesture to "cap" economic damages is unusual because most often tort reform has resulted in caps being placed on noneconomic damages or on the total amount of compensation.[95] In contrast to caps on noneconomic damages, which disproportionately affect women and less affluent victims,[96] caps on economic damages tend adversely to affect the more affluent victims because, of course, members of this group suffer greater income loss when they are injured or killed. Moreover, the Fund's mandatory deduction of amounts received through collateral sources is also likely to affect wealthier families to a greater extent, because they were better able to afford insurance and other benefits prior to the accident.[97] In this respect, the Fund resembles social insurance schemes that expressly target low-income and middle-income families, with the notable qualification that the Fund's generous ninety-eight percent limitation covers the economic losses of all but the most affluent families.

Mr. Feinberg's approach to limiting economic damages suggests that, even within a system of individualized justice, perceived need can play a legitimate role. In a statement defending his position, Mr. Feinberg referred to language in the Air Safety Act that permits him to take into account the "individual circumstances of the claimant"[98] in determining the award. Rather than interpret the language as merely authorizing an increase in an award in cases of financial hardship, Mr. Feinberg reads the statutory language as giving him the discretion more generally to take into account the financial needs of the claimants and to impose a limit on awards he deems excessive. To this end, Mr. Feinberg has announced that "multi-million dollar awards out of the public coffers are not necessary to provide [families] a strong economic foundation from which to rebuild their lives."[99]

This presumptive upper limit on recovery prompted families of very high earners with potentially large deductions for collateral sources to challenge the

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94. September 11th Victim Compensation Fund of 2001, 28 C.F.R. §§ 104.31(b)(1), 104.33(f)(2) (2003).

95. Professor Dobbs reports that well over half the states have enacted some kind of cap on damages, either on noneconomic damages only or on the total amount of tort damages. *See* 2 DAN B. DOBBS, THE LAW OF TORTS § 384, at 1071-73 (2000); *see also* MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES 787-88 (7th ed. 2001) (stating that nearly all states have enacted some kind of tort reform within the last 25 years).

96. *The Architecture of Bias*, *supra* note 20, at 519-21. *See generally* Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847 (1997).

97. *See supra* notes 40-42 and accompanying text.

98. *See* Air Safety Act, Pub. L. No. 107-42, § 405(b)(1)(B)(ii), 115 Stat. 230, 238 (2001).

99. Interim Rule, *supra* note 1, at 66,278.

legality of the regulations. In *Colaio v. Feinberg*,[100] the U.S. District Court for the Southern District of New York rejected a claim that the rules governing the Fund were outside the authority of the Act and thus invalid. The central issue in the case was whether Mr. Feinberg had the authority to award families of high earners less than their full economic losses and to take into account the financial needs of the claimants.[101] The court interpreted congressional intent as delegating broad discretion to the Special Master and as permitting awards for economic losses that do not always replicate what would be allowed under state tort law.[102]

The Special Master's effort to curb awards under the Fund is consistent with an emphasis on the needs and dependency of survivors, which, like the advantage given to married victims discussed above,[103] departs from an individualistic view of compensation that would simply replace the income the deceased would have earned. However, this effort to "shave off the top" is not dramatic and does not transform the Fund into a compensation program based primarily on need rather than on income loss. Like traditional torts, the amount of economic loss is still calculated primarily based on the amount of past earnings, and the amount of the total award is still largely dependent on the calculation of economic losses.[104]

B. Gender Equity: Calculating Lost Future Earning Capacity and the Value of Homemakers' Services

Although it is not often stated explicitly, the prototypical 9/11 victim is likely to be male, in part because most of those who died in the attacks were indeed men.[105] There were, however, 739 women killed at the World Trade Center and the other two locations.[106] For these female victims, two little-noticed provisions in the Interim and Final Rules are potentially quite significant.

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100. 262 F. Supp. 2d 273, 298-301 (S.D.N.Y. 2003). For a pre-decision analysis of the issues in the case, see Jonathan D. Melber, Note, *An Act of Discretion: Rebutting Cantor Fitzgerald's Critique of the Victim Compensation Fund*, 78 N.Y.U. L. REV. 749 (2003).

101. *Colaio*, 262 F. Supp. 2d at 286.

102. *Id.* at 293 ("The Act did not mandate that some advantages to *plaintiffs* existing in particular state laws should be reflected in compensation awards to *claimants*." (emphasis in original)).

103. *See supra* notes 56-72 and accompanying text.

104. *See supra* notes 52-55 and accompanying text.

105. The ratio of male to female victims at the World Trade Center was approximately 3 to 1. WTC STATISTICS, SEPTEMBER 11, 2001 VICTIMS, www.september11victims.com, *at* http://www.september11victims.com/september11victims/wtc_statistics.htm (last visited Nov. 26, 2003).

106. *See* F.B.I., U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 2001, at 302 (2002), *available at* http://www.fbi.gov/ucr/cius_01/01crime5.pdf.

The first provision relates to the calculation of economic loss and the formula for determining the amount of income a person would have earned during her lifetime (i.e., loss of future earning capacity).[107] Briefly stated, loss of future earning capacity is typically measured by the number of years the person would have worked had she not been injured ("work-life expectancy") and the amount she would have earned each year, reduced to present value.[108] A common practice in tort litigation for calculating lost future earning capacity is to use separate gender-based tables, one for men and one for women.[109] Although, in other areas of the law, the use of explicit gender classifications is treated as suspect—both as a matter of policy and of constitutional law[110]—the use of gender-based tables to determine work-life expectancy has often been uncritically accepted, perhaps because the practice is typically buried within an expert witness's statistical report. Relying on such separate gender-based economic tables, however, results in dramatically lower awards for women.[111] This disparity arises because women have historically interrupted their careers to raise families and have been pushed out of the workplace by discriminatory practices, including pregnancy discrimination, harassment, and unequal pay.[112] To some extent, however, these historical patterns have abated, resulting in greater labor force participation by women, even by mothers with young children.[113]

A primary objection to the use of gender-based tables is that they tend to reproduce the discriminatory patterns of the past, such as presuming that women will continue to take long periods of time away from the workplace to raise children. Use of gender-specific data also means that discrimination in one area (e.g., the setting of pay rates) will influence the valuation of women's lives in another area—namely, the calculation of personal injury and wrongful death awards.[114] As a result, women's groups and scholars have urged that the use of gender-based tables be discontinued.[115] They have argued that, in their

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107. *See* Interim Rule, *supra* note 1, § 104.43, at 66,286; EXPLANATION OF PROCESS FOR COMPUTING PRESUMED ECONOMIC LOSS, *supra* note 56, at 1-3.

108. *See* Evelyn Esther Zabel, Note, *A Plain English Approach to Loss of Future Earning Capacity*, 24 WASHBURN L.J. 253, 257-61 (1985).

109. *See* Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data In Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 79-84 (1994).

110. *See id.* at 104-11 (discussing constitutional challenges to gender-based classifications).

111. *See id.* at 83-84 (estimating an award for a woman who becomes permanently disabled would be only 65% of a similarly situated man's award).

112. *See id.* at 81-82.

113. In 1988, 69.5% of women with children under six years of age worked full-time; the figure rose to 71.2% in 2001. *See* HANDBOOK OF U.S. LABOR STATISTICS (Eva E. Jacobs ed., 6th ed. 2003).

114. *See* Chamallas, *supra* note 109, at 84-85.

115. *See id.* at 78; Martha F. Davis, *Valuing Women: A Case Study*, 23 WOMEN'S RTS. L.

stead, either blended tables (i.e., gender-neutral tables) be used for all victims or that "male" tables be used to determine work-life expectancy for both men and women. Using gender-neutral tables tends to lower awards for men and raise awards for women, in effect taking away the privilege of being male in the workplace. Using male tables for both sexes has the effect of raising women's awards without lowering awards for men. This latter method assumes that women's lower awards are largely the result of gender bias and that the male award represents a nondiscriminatory amount.

Initially there was some confusion as to whether the Special Master might use gender-based tables in calculating awards under the Fund.[116] After receiving written comments from the National Organization for Women (NOW) and meeting with NOW Legal Defense Fund attorneys, Mr. Feinberg announced in the Final Rule that he would use work-life expectancy tables for males to calculate economic losses for both male and female victims.[117] Mr. Feinberg's decision to use the male tables for both men and women eliminates any gender disparity in this portion of the award and means that women will not be disadvantaged because of past discriminatory patterns or practices. In keeping with the Fund's spirit of generosity, Mr. Feinberg's approach yields a higher amount than would the use of a unitary or blended table for both sexes, because it does not have the effect of "lowering" awards for men and it raises women's awards to the higher male level.[118] Martha Davis, the former Legal Director of the NOW Legal Defense Fund, has expressed the hope that Mr. Feinberg's use of male work-life tables will set a precedent for judges and litigators that will carry over to the tort context.[119] In this one respect, the Fund may serve to raise expectations of tort plaintiffs seeking compensation for wrongful death and personal injury.

The second aspect of the Fund that is of particular interest in the valuation of the lives of women victims relates to the monetary value of household services. Although both men and women perform unpaid work in the home, this item disproportionately affects women because women continue to perform a vastly disproportionate share of household services,[120] including not

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REP. 219, 221 (2002); Sherri R. Lamb, Comment, *Toward Gender-Neutral Data for Adjudicating Lost Future Earning Damages: An Evidentiary Perspective*, 72 CHI.-KENT L. REV. 299, 328-29 (1996); Letter from Martha Davis, Vice President and Legal Director, NOW Legal Defense and Education Fund, to Kenneth L. Zwick, Director of Office of Management Programs, Civil Division, U.S. Dep't of Justice (Jan. 22, 2002), *available at* NOW Legal Defense and Education Fund, www.nowldef.org/html/nes/publiccomment.pdf (hereinafter NOW Comment).

116. *See* Davis, *supra* note 115, at 220.

117. Final Rule, *supra* note 1, at 11,238; *see also* EXPLANATION OF PROCESS FOR COMPUTING PRESUMED ECONOMIC LOSS, *supra* note 56, at 3.

118. Mr. Feinberg's approach has previously been used in tort cases in Canada. For commentary on this use, see Chamallas, *supra* note 109, at 100-04.

119. *See* Davis, *supra* note 115, at 222.

120. *See id.* at 220 (citing time-use study indicating that full-time working women

only cleaning the house, cooking, and myriad other daily household tasks, but also caring for children and other family members.[121] Particularly because women generally earn less than men in the paid workplace, any amount awarded to compensate for unpaid labor may serve to offset the gender disparity in wages and represents a nontrivial component of a female claimant's total award.

The Interim Rule treated household services largely as noneconomic in nature and ostensibly included them within the lump sum award given for noneconomic damages.[122] Under the Interim Rule, household services were considered to have an economic dimension and, thus, properly recoverable under the category of economic losses, only for a narrow class of victims: those who had no prior earned income (e.g., full-time homemakers) and those who worked only part-time outside the home.[123] In such cases, a replacement value measure of household services was used.[124]

The Interim Rule's approach to household labor contained two flaws commonly identified by feminist critics.[125] First, it treated work done in the home as if it were not "real" work, but merely an expression of love and affiliation. Scholars such as Katharine Silbaugh have noted that courts have tended to downplay or to ignore the economic value of housework, with the consequence that women's household labor is often devalued in law.[126] Their point is not that loving care and personalized attention have nothing to do with housework. Rather it is that, in our market economy, activities classified as noneconomic (as opposed to economic) and intangible (as opposed to tangible) have a kind of second-class status and are often overlooked or diminished when losses are calculated.[127]

Second, the Interim Rule also made the mistake of thinking in terms of the familiar "homemaker/working woman" dichotomy and assuming that only

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typically perform 290 hours more unpaid work than men); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 8-10 (1996) (citing time-use studies indicating that men's share of housework was only 60% of women's).

121. *See* Silbaugh, *supra* note 120, at 11.

122. *See* Interim Rule, *supra* note 1, § 104.46, at 66,286 (codified at 28 C.F.R. §§ 104.46 (2003)) ("Such presumed losses include any noneconomic component of replacement services loss.").

123. *See id.* §§ 104.43(c), 104.45(c), at 66,286-87 (codified at 28 C.F.R. §§ 104.43(c), 104.45(c) (2003)).

124. Interim Rule, *supra* note 1, at 66,286. A more generous approach would have been to measure the homemaker's contribution by reference to opportunity costs, particularly in cases of persons whose educational level indicates that they could have earned significantly more in the marketplace.

125. *See* MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 192-199 (2d ed. 2003).

126. *See* Silbaugh, *supra* note 120, at 7-8.

127. *See The Architecture of Bias*, *supra* note 20, at 528-30.

"homemakers" spend appreciable amounts of time working in the home.[128] Notably, there was no provision in the Interim Rule for awarding a sum to full-time workers to compensate them for the loss of services they perform in the home. This omission vastly underestimates the importance of household labor for full-time workers. One survey, for example, reports that married women working full time with children under the age of eighteen spend approximately 35.6 hours per week on household labor; the comparable figure for men is 26.9 hours.[129]

In these two respects (treating household labor as noneconomic and overlooking the housework done by full-time employees), the Interim Rule was less generous than most courts. As was pointed out by NOW in its rulemaking comments,[130] it is accepted practice for courts to compensate victims, including those who work full-time, for the value of replacement services for their household work.[131]

In the Final Rule, Mr. Feinberg acknowledged these objections and agreed that claimants, presumably including full-time employees, could attempt to raise their award by presenting individualized data regarding the cost of replacement services at a compensation hearing.[132] However, this step does little for claimants who do not want to go through the trouble and delay of seeking an individual hearing. Here is one instance where an apparent lack of reliable government data on the value of household services means that an important component of damages has not been built into the grid for presumed economic losses.[133] Unless compensation for household services is routinely awarded as a component of economic loss, there is a risk that the Fund will undervalue the lives of women and others who perform valuable unpaid labor.

C. A Lump Sum Approach to Noneconomic Losses

The most unusual feature of the September 11th Victim Compensation Fund is its approach to noneconomic damages. The definition of noneconomic losses under the Air Safety Act is broad, encompassing "losses for physical

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128. *See* CHAMALLAS, *supra* note 125, at 193-94.

129. *See* NOW Comment, *supra* note 115, at 7 (citing John Ward, *John Ward Economics Time-use Analysis*, *available at* http://www.johnwardeconomics.com).

130. *Id.*

131. *See, e.g.*, Stanford v. McLean Trucking Co., 506 F. Supp. 1252, 1256 (E.D. Tex. 1981) (allowing compensation for deceased spouse's services in the home); Creel v. St. Charles Gaming Co., 707 So. 2d 475 (La. Ct. App. 1998) (awarding damages when injured wife was no longer able to provide her prior level of household work and rejecting argument that such damages are only proper where parties actually had hired help for such services); Cramer v. Kuhns, 630 N.Y.S.2d 128, 139 (N.Y. App. Div. 1995) ("We have long considered an injured plaintiff's loss . . . separate and apart from pain and suffering.").

132. Final Rule, *supra* note 1, at 11,239.

133. *See* Davis, *supra* note 115, at 220-21 (discussing lack of reliable United States data compared to Canada and Australia).

and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature."[134] This long laundry list suggests that each kind of intangible harm should be separately considered. With respect to noneconomic damages, however, Mr. Feinberg opted for a lump sum approach or what he calls "presumed equality." Although a claimant still has the right to present individualized evidence if he or she requests a hearing, the rules set a separate lump sum amount for each of two categories of noneconomic harm: (1) the harm the victim suffered prior to death (the "survival" or "pre-impact" damages[135]), and (2) the intangible losses of family members stemming from the victim's death (the "loss of consortium" or "relational harms"[136]). The first compensates for the pain, suffering, and other distress that the *victim* suffered prior to death, while the second compensates *survivors* for their loss of companionship, grief, and other pain.

Specifically, Mr. Feinberg set the presumed noneconomic award for survival damages for all decedents at $250,000.[137] The rules assert that this amount was chosen because it is the amount set under federal programs for public safety officers who are killed while on duty and for members of the United States military who are killed in the line of duty.[138] This lump sum approach is very different from the individualized calculations of pre-impact or survival damages in tort suits that are based on the victim's experience and suffering prior to his or her death.[139] Mr. Feinberg has refused to evaluate the different degrees of pain and anguish suffered by the 9/11 victims, based on existing evidence such as a cell phone conversation with a spouse just prior to death or being trapped in one of the towers above the impact area.[140] In his statement accompanying the Interim Rule, Mr. Feinberg remarked that he feared that "[w]hile these circumstances may be knowable in a few

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134. Air Safety Act, Pub. L. No. 107-42, § 402(7), 115 Stat. 230, 237 (2001).

135. *See generally* 2 DOBBS, *supra* note 41, § 8.3(2), at 425-26 (discussing survival damages).

136. *See generally* 2 *id.* § 8.3(4)-(5), at 430-45 (discussing wrongful death and relational damages).

137. *See* September 11th Victim Compensation Fund of 2001, 28 C.F. R. § 104.44 (2003). With respect to victims who suffered physical harm but did not die, the rules also set the presumed noneconomic loss at $250,000, making adjustments, however, "based upon the extent of the victim's physical harm." 28 C.F.R. § 104.46.

138. Final Rule, *supra* note 1, at 11,239 (citing 38 U.S.C. § 1967 (military personnel) and 42 U.S.C. § 3796 (public safety officers)).

139. *See, e.g.*, Wellborn v. Sears, Roebuck & Co., 970 F.2d 1420, 1428 (5th Cir. 1992) (awarding $1,000,000 for the pre-death suffering of a boy pinned down by an automatic garage door); Guzman v. Guajardo, 761 S.W.2d 506, 512 (Tex. Ct. App. 1988) (upholding an award of $600,000 for fifteen minutes of a child's severe pain before death).

140. Interim Rule, *supra* note 1, at 66,279.

extraordinary circumstances, for the vast majority of victims these circumstances are unknowable."[141] In the Final Rule, Mr. Feinberg further justified his decision to use a lump sum approach by noting the virtue of having "some measure of consistency among awards" and relieving him of the necessity of "'play[ing] Solomon' by attempting to place a value on human lives on an ad hoc basis."[142]

Some persons suspected different motives for the decision to set the amount of noneconomic damages for decedents at $250,000. In an article for the Association of Trial Lawyers of America convention, Cynthia Lebow asserted that "it has been widely reported, and Mr. Feinberg has conceded, that the amount was negotiated with the White House, the Justice Department, and the Office of Management and Budget."[143] In Ms. Lebow's view, the $250,000 represents the kind of low cap on pain and suffering damages that tort reformers have long sought. Indeed, the families of many victims objected that the amount was too low and that it dishonored the memory of those killed.[144]

However, it should be noted that under the Fund, the $250,000 cap is not designed to measure the total value of the victim's life; it is merely the amount accorded for survival damages, representing only the pain and suffering the victim experienced just prior to death. In litigated cases, the pain and suffering award for a victim who dies is often lower than the pain and suffering award of a person who survives and is disabled, simply because the survivor suffers for the remainder of his or her life. Thus, the more controversial application

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141. *Id.*

142. Final Rule, *supra* note 1, at 11,239.

143. Lebow, *supra* note 2, at *9; *see also* Comment on Interim Rule, Cantor Fitzgerald L.P., New York, N.Y.'s, N002305 (Jan. 22, 2002), U.S. Dep't of Justice, *available at* http://www.usdoj.gov/victimcompensation/interim/njan28/N002305.html (indicating that the $250,000 limit was negotiated with the White House Office of Management and Budget and that $250,000 for pain and suffering is a cornerstone of GOP tort reform legislation).

144. *See, e.g.*, Comment on Interim Rule from Keefe, Bruyette & Woods Family Group, P000316 (Jan. 31, 2002), U.S. Dep't of Justice, *available at* http://www.911digitalarchive.org/doj/emails/P000316.html (noting that the presumed award for noneconomic losses is "the most glaring insult to the Congressional commitment made to the families"); Individual Comment on Interim Rule from Garden City, N.Y., N002368 (Jan. 22, 2002), U.S. Dep't of Justice, *available at* http://911digitalarchive.org/doj/emails/N002368.html ("In many cases the September 11 victims suffered indescribable pain, agony and mental anguish for prolonged periods of time (up to several hours) . . . [and] were aware that they were going to die a horrible and painful death."); Individual Comment on Interim Rule from Darien, Conn., N002196 (Jan. 21, 2002), U.S. Dep't of Justice, *available at* http://www.usdoj.gov/victimcompensation/interim/njan25/N002196.html ("[M]any . . . were incensed at the amounts being suggested."); Individual Comment on Interim Rule from Jersey City, N.J., N002469 (Jan. 18, 2002), U.S. Dep't of Justice, *available at* http://www.usdoj.gov/victimcompensation/interim/njan31/N002469.html ("Non-economic losses are far too low . . . they are one-tenth of those made in comparable cases.").

of the $250,000 lump sum is its use as a starting point for determining the pain and suffering of 9/11 victims who survived the attacks.

Mr. Feinberg's reluctance to distinguish among victims with respect to awards for survival damages is a pragmatic response characteristic of an administrative no-fault fund. Because there was no readily available matrix or grid that could be used to evaluate different classes of claims with respect to this component of damage, Mr. Feinberg essentially had three choices: (1) award a lump sum; (2) award no damages; or (3) afford everyone an individualized hearing. As can be seen from his choice to rely on a grid to calculate presumed economic losses, Mr. Feinberg apparently did not envision his mission as administrator of the Fund as involving the adjudication of thousands of individual claims, although to do so would not have been impossible. Instead, the decision to award a lump sum mirrors the Fund's approach to presumed economic damages; it encourages (perhaps even pressures) claimants to accept a set amount, but allows for the possibility of individualized review to those few who insist upon it. What is potentially lost by not affording individualized hearings as a matter of course, however, is the opportunity for family members to relate and reconstruct the specifics of their loss in an official proceeding. For some claimants, the difficulty of placing a value on their loved ones' lives might be compounded, rather than alleviated, by the Fund's refusal to treat victims as unique individuals and to take the time necessary to document and understand their suffering prior to death.

I am somewhat surprised, however, that Mr. Feinberg chose to award any sum at all for survival damages. A common argument against awarding survival damages is that once the victim has died, there is no longer any need to compensate him for pain and suffering prior to death. Moreover, it is clear that this category of loss properly belongs to the deceased, not to the claimants or survivors. Thus, some states, including California,[145] have abolished survival damages of this sort.[146] Particularly when there is no possibility of deterring a defendant's behavior by awarding a sum for pre-impact suffering, it is not easy to come up with a rationale for allowing such an award. In this respect, the lump sum award for the decedent's death afforded under the Fund appears to take the deceased's, as opposed to the survivors', perspective in measuring losses to a deceased's estate.

In my view, the $250,000 lump sum award treats the 9/11 victims more like heroes than like tort victims, although there is a serious question as to whether the amount was set high enough to carry this message.[147] The lump

145. CAL. CIV. PROC. CODE § 377.34 (West 1992).

146. *See* 2 DOBBS, *supra* note 95, § 295, at 806 (discussing statutory exclusions for pre-death pain and suffering).

147. *See* Individual Comment on Interim Rule from Darien, Conn., N002196, *supra* note 144 ("[W]hy not raise the non-economic settlement award to an amount that reflects the supreme sacrifice these civilians and their families made unwillingly and unknowingly? So much rhetoric is bandied about—that the victims are true war heroes. Compensate them

sum award is akin to a memorial to their memory[148] and accordingly treats all victims alike.[149] It is noteworthy that Mr. Feinberg has also indicated that he will use his discretion to assure, as far as possible, that most families of victims who died will receive a minimum of $250,000 from the Fund (after collateral source deductions), except in rare cases where the claimant has already received very substantial compensation from collateral sources.[150] This guaranteed award to the families of "heroes" is a new form of compensation that is not recognized in tort.

Treating all the 9/11 victims as heroes has the political advantage of drawing a distinction between them and ordinary tort victims, thus perhaps reducing the "horizontal equity" problem to the narrower question of whether victims of similar attacks (such as the Oklahoma City bombing) should also be compensated. But the analogy is strained because most of the 9/11 victims were not police officers or rescue workers, but ordinary people.[151] Insofar as the September 11th Fund is simply a substitute for lawsuits against the airlines, it seems disingenuous to downplay the similarities between the 9/11 victims and ordinary tort victims.

With respect to relational losses of the families of victims who died, Mr. Feinberg also opted for a non-individualized, lump sum approach. Under the Final Rule, a spouse and each dependent of a decedent will receive $100,000 for his or her noneconomic relational losses, an award that is akin to an award for loss of consortium.[152] The amount was raised from a proposed $50,000—the amount that had been set in the Interim Rule—in response to critical comments submitted during the rulemaking process.[153]

Even this augmented amount strikes me as quite stingy. The sum is designed to compensate persons for what one group of psychologists who submitted comments to the Fund described as "the profound psychological ramifications of experiencing the traumatic loss of a loved one."[154] Tort

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accordingly!!").

148. I am grateful to Professor Paul J. Zwier II for this insight.

149. It should be noted that, at least in theory, lump sum awards, such as these that are not even implicitly tied to economic losses, may favor less affluent victims. The lump sum approach contrasts sharply with the approach in tort cases where fact-finders often use economic losses as an anchor upon which to base their calculation of noneconomic damages.

150. Final Rule, *supra* note 1, at 11,241.

151. *See* Comment on Interim Rule from Keefe, Bruyette & Woods Family Group, P000316, *supra* note 144 ("[I]t is hard to understand how the suffering of a group of civilians killed in the offices in which they worked, completely unprepared for the risk of violent deaths and injuries which they suffered, could be equated with public safety officers who have voluntarily chosen to put themselves at the risk of injury and even death as part of their daily job. . . . The situations are not analogous and any attempts to draw such analogy are insulting to the victims . . . .").

152. Final Rule, *supra* note 1, at 11,239.

153. *See supra* note 147 and accompanying text.

154. Individual Comment on Interim Rule from Stony Brook, N.Y.,

awards for relational harm respond to the fact that a family member's life often changes dramatically with the loss of a parent or spouse.[155] There is evidence that the effects of a sudden, traumatic loss of a family member are more severe than those suffered from "normal" losses and that, in addition to grief, family members may experience traumatic stress symptoms.[156] Family members under such circumstances may need to receive counseling and other treatment for mental health problems that often accompany trauma, such as depression, anxiety, and a predisposition to suicide. Moreover, in contrast to the pain and suffering of victims who die shortly after an attack, the emotional harm to survivors can be long-term. These are real, pressing losses to survivors that are not adequately captured in the lump sum award of $100,000. Insofar as the Fund undervalues this component of relational harm, it undermines the Fund's capacity to provide fully for the needs of survivors and seems at odds with the "needs" orientation of the Fund as it relates to presumed economic loss.

Additionally, there is less justification for using a lump sum approach when it comes to relational harms. Unlike the dilemma surrounding survival damages, in which the precise circumstances regarding an individual's death were unknowable for most victims, living claimants and family members can relate in precise and individualized terms how the death of their spouse or parent has adversely affected their lives and what resources they need to cope with the trauma. Setting a presumed amount has the unfortunate effect of discouraging family members from telling their individual stories of loss and using the proceedings to construct meaning out of their tragedy.

The $100,000 lump sum award for relational harm is even less individualized than the grid for economic losses because nothing about the individual or his relationship to the victim is taken into account, except for the designation as spouse or dependent. Moreover, there is also no indication that other persons who suffered severe relational loss, such as unmarried domestic partners or parents who lost a child, will be entitled to the award. It seems that, despite Congress's enumeration of the various kinds of nonpecuniary injuries,[157] Mr. Feinberg was intent on keeping the figure for noneconomic losses low and responding in a categorical fashion. Sadly, I fear that the Fund's lump sum approach to relational losses will serve only to further marginalize this important element of damages.[158]

P000490 (Jan. 24, 2002), U.S. Dep't of Justice, *available at* http://www.usdoj.gov/victimcompensation/postinterim/pfeb14/P000490.html.

155. Although some state wrongful death statutes continue to limit recovery to economic losses, individualized tort litigation allows plaintiffs more opportunity to characterize relational harms, such as medical expenses stemming from trauma, as economic. *See* 2 DOBBS, *supra* note 95, § 297, at 811-12.

156. *See* Individual Comment on Interim Rule, P000490, *supra* note 154.

157. *See* Air Safety Act, Pub. L. No. 107-42, § 402(7), 115 Stat. 230, 237 (2001).

158. *See The Architecture of Bias*, *supra* note 20, at 500-03 (discussing the marginalization of relational harms).

III. CONCLUSION

Like the tort system itself, the September 11th Victim Compensation Fund neither reflects a consistent social vision nor furthers a coherent compensation philosophy. Instead, the Fund is a blended scheme that combines features of a tort-like system of individualized justice with a no-fault insurance system. The Fund is partly animated by a desire to provide for the needs of surviving family members and partly designed to compensate the victim's estate for losses traceable to the death, regardless of the needs of survivors. It infuses considerations of gender equity and financial need into a scheme that largely seeks to restore the status quo ante. Although it is not oblivious to the plight of same-sex couples and nontraditional families, it does not treat them on a par with married couples. It is generous for a no-fault fund, but the awards, particularly for noneconomic damages, provide far less that would likely be awarded in a tort suit. In short, the Fund is a political compromise.

In a speech at the annual meeting of the American Association of Law Schools,[159] Mr. Feinberg indicated that he would have preferred a compensation system that provided the same amount to everyone, with no limitation on the right to sue. Such a scheme certainly would have been easier to administer and would have entailed less paperwork for families. Depending on the amount given to each family, perhaps affluent families would have been more inclined to sue under such a scheme. But if there were no limitations on filing suit, doing so would represent their choice. The critical issue is whether such a simple approach would have been preferable to the more complicated program devised by Congress and Mr. Feinberg.

Without knowing the amount of such an across-the-board compensation award, it is impossible for me to answer the question posed. For the most part, I have little difficulty with Mr. Feinberg's and Congress's attempts to bring down the top awards by instituting a quasi-cap on economic damages and by deducting collateral sources. Because the Fund is financed by general federal revenues, it seems wise not to try to replace the entire loss of affluent families, at least if the money "saved" is used to provide a secure economic foundation for more needy families. Unfortunately, the amounts provided under the Fund for noneconomic damages are inadequate and serve to reinforce the prevailing view that these kinds of losses are of less importance. By giving short shrift to noneconomic losses, the Fund continues to use economic loss as the principal yardstick by which to measure compensation, albeit tempered around the edges by considerations of need and social equity. The Fund may be a good political compromise, but its redistribution of income does not alter the status quo dramatically enough truly to treat all the 9/11 victims like heroes.

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159. Kenneth R. Feinberg, Address on Insurance Compensation after September 11 at the American Association of Law Schools Annual Meeting (Jan. 2003).